

**R.D. # 10-10
Cranford, New Jersey**

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22**

UNITED ARAB AGENCIES, INC.,

Employer

and

CASE 22-RC-13184

**INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION, LOCAL 1964, AFL-CIO**

Petitioner

DECISION AND DIRECTION OF ELECTION

I. INTRODUCTION

Petitioner, International Longshoremen's Association, Local 1964, AFL-CIO (the Union) filed a representation petition pursuant to Section 9(c) of the National Labor Relations Act. At the hearing on this petition, the Union argued that its petitioned-for unit consists of a port captain, regional container controller, terminal and marine superintendent, and equipment coordinator employed by United Arab Agencies, Inc. (the

Employer) at its Cranford and Elizabeth, NJ facilities.¹ The Employer argues that the port captain and regional container controller should be excluded from the petitioned-for unit because they are managerial employees and/or supervisors as defined in the Act.² Based on the following facts and analysis, I reject this argument and order an election as set forth below.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,³ the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed;
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein;⁴

¹ At the conclusion of the hearing, the parties stipulated that the Employer's assistant operations manager, Tom Miller, is also the Employer's HAZMAT specialist. Relying on the Region's finding in *Cosco North America, Inc.* (Case 22-RC-12236, Decision and Direction of Election issued on October 25, 2002) that HAZMAT specialists are managerial employees, the parties stipulated that Miller is a managerial employee, and therefore, should be excluded from the petitioned-for unit.

² At the commencement of the hearing, the Employer argued that if the port captain and/or regional container controller were not found to be managerial employees or supervisors, then the appropriate bargaining unit should consist of two separate bargaining units: logistics department employees based out of its Cranford corporate office and operations department employees based out of its Elizabeth terminal facility. At the conclusion of the hearing, the Employer withdrew this argument.

³ Briefs filed by the Petitioner and the Employer have been duly considered. In its Brief, the Employer attached a December 7, 2010 certification from Operations and Logistics Manager S.H. Bae and as Exhibit A, a December 6, 2010 performance appraisal prepared by Port Captain Yoon. I note that the certification was prepared one day after the hearing closed and that the performance appraisal was neither introduced nor offered into evidence on December 6, the final day of the hearing. Accordingly, in rendering my Decision in this matter, I have not considered either the Certification or the performance appraisal. Pursuant to Section 102.65(e)(1) of the Board's Rules and Regulations, a party to a proceeding may, because of extraordinary circumstances, move after the closing of the hearing for reopening of the record. As the Employer did not move to reopen the record and as I did not rule on any motion for reconsideration, I can not give any consideration to either the certification of Manager Bae or the performance appraisal.

⁴ The parties stipulated that during the preceding twelve months, the Employer purchased and received at its Cranford and Port Newark, New Jersey locations, goods and supplies valued in excess of \$50,000 directly from suppliers located outside the State of New Jersey.

3. The labor organization involved claims to represent certain employees of the Employer;⁵
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act;
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act for the reasons described *infra*:

All full-time and regular part-time Port Captains, Regional Container Controllers, Terminal and Marine Superintendents, and Equipment Coordinators employed by the Employer at its Cranford and Elizabeth, New Jersey facilities, excluding all supervisors and guards as defined by the Act.

II. FACTS

a. Background

The Employer is a Delaware corporation, with its corporate office located in Cranford, New Jersey, and with offices in Elizabeth, New Jersey, Norfolk, Virginia, and Savannah, Georgia. The Employer employs approximately 88 employees throughout the United States, with approximately 51 employees located in Cranford and 2 employees in Elizabeth. The Employer is the North American general shipping agent for United Arab Shipping Company (UASC), an alliance of six Middle Eastern countries with its commercial headquarters in Dubai. UASC owns and operates ships used to transport cargo in containers for its customers in a line of service between the eastern seaboard of

⁵ The parties stipulated, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

the United States, southern Europe, and the Middle East. In the New York City area, UASC's ships berth at the Maher Terminal in Elizabeth, New Jersey.

The Employer is responsible for the loading and unloading of UASC's vessels and tracking and maintaining its containers and chassis while at port and on land. Neither the Employer nor UASC owns the Maher Terminal (Terminal). Rather, the Employer contracts with the Terminal for terminal services, meaning that the Terminal provides a berth for ships owned or chartered by UASC as well as stevedore services, meaning that the Terminal provides employees called "stevedores" to unload and load cargo, along with the necessary equipment (e.g. cranes) to perform these functions. The stevedores are employees of the Terminal and the terms and conditions governing their employment are set forth in a collective bargaining agreement between the International Longshoremen's Association and the New York Shipping Company. Other shipping companies berth ships at the Terminal. Usually, one UASC ship arrives at the Terminal each week. After berthing in Elizabeth, the ship travels to Norfolk and Savannah before sailing on to Europe.

The petitioned-for employees work in the Employer's operations and logistics department, which also includes equipment coordinators in Norfolk and Savannah, a maintenance and repair manager and coordinator (both based out of Savannah), and the Savannah port captain (Arvind Vyas). S.H. Bae (Bae) is the operations and logistics department manager. He maintains an office at the Employer's Cranford facility and uses a spare desk when he visits the Elizabeth terminal. Bae reports to Anil Vitarana (Vitarana), the Employer's president, who also maintains an office in Cranford. The regional container controller, Paige Fritz-Goldschmitt (Goldschmitt), occupies a cubicle

in the Cranford office as does equipment coordinator Banty Patel (Patel)⁶. Housed in separate areas of the Cranford corporate office are the Employer's human resources, sales, commercial, accounting, IT, customer service, and audit and contracting departments.

b. Formulation of Operational and Administrative Policies

All operational policies, including stowage plans and coastal schedules, are formulated by UASC's Dubai headquarters. All Employer administrative policies, including absenteeism and work schedule policies, are formulated by Vitarana in consultation with human resources in Cranford. All employees in Cranford receive the same health benefits and have access to the same 401(k) retirement plan.

c. Manager and Department Meetings

Vitarana holds bi-weekly "manager" meetings, which Bae and Goldschmitt attend. Elizabeth port captain DI Yoon (Yoon) is invited to attend these meetings, but is excused due to schedule conflicts with berthing vessels. Vitarana says that the purpose of the meeting is to "apprise all the managers as to what's going on within North America for us, as well as developments within the parent company, as well as any issues that come up in our daily operations and how we resolve them..." It is unclear from the record which employees from outside the operations and logistics department attend these meetings, although Vitarana states that "all those with managerial rankings or managerial responsibility" are invited to attend these meetings. Minutes of these meetings are distributed electronically to attendees and invitees. Bae, Yoon, and

⁶ In about May 2010, Bae initiated a temporary cross-training assignment for Patel and Lal Peiris (Peiris) whereby Patel would work at the Terminal as the terminal and marine superintendent and Peiris would assume Patel's responsibilities in the Cranford office as an equipment coordinator. The cross-training assignment has a scheduled duration of about one year.

Goldschmitt receive these e-mails, but other department employees, such as Vyas, Miller, Peiris, and Patel, do not.

Furthermore, the Employer uses a manager e-mail distribution list to disseminate company information. Bae, Goldschmitt, and Yoon receive these e-mails. In response to the Hearing Officer's questions, Vitarana described this e-mail list as containing "...reports, confidential information...all manager information that's within the organization...Anything that comes from headquarters determining company development policies, recent meetings held at headquarters, various reports produced by the chief operating officer and various vice-presidents..." (Tr. 62-63). The Employer offered no documentary evidence or specific examples to supplement Vitarana's testimony on this subject.

In addition to "manager" meetings, the Employer also conducts bi-weekly operations department meetings. Bae leads these meetings in which Miller, Goldschmitt, and employees from the Savannah and Cincinnati offices discuss what is coming in on the vessels, whether they are on schedule, what the Employer's equipment (containers and chassis) numbers look like, and any problems in the Employer's Midwest operations.

UASC occasionally holds "familiarization" meetings in Dubai for certain of the Employer's employees. It is unclear from the record how often these meetings are held. Bae and Yoon have attended these meet and greet functions at UASC headquarters. Goldschmitt has been invited, but has declined to attend because she does not fly. Patel and Peiris have not been invited to these "familiarization" meetings, although Patel attended some form of training in Dubai early in his tenure with the Employer.

d. **The Port Captain**

Vitarana describes the port captain in Elizabeth as the Employer's "eyes and ears in terms of handling the ships when they arrive in the United States and when they depart from the United States. And he coordinates this function together with our corporate headquarters in Dubai. So he is fully responsible for the handling of the ships from the time they arrive in the U.S. till they depart from Savannah." (Tr. 34-35). The Employer considers the Elizabeth port captain to be a managerial employee due to the heightened volume of customs clearinghouse work performed at the Terminal relative to other ports of call. The Employer does not consider the Savannah port captain to be a supervisor or manager.

Yoon is the port captain at the Employer's Elizabeth facility, as well as in Norfolk. Yoon is a salaried employee who earns approximately \$87,500 a year. When he started working for the Employer in about August 2008, he was also assigned port captain responsibilities in Savannah. In 2009, the Employer hired Arvind Vyas (Vyas) to be the new Savannah port captain. Yoon possesses a bachelor's degree in nautical science from Korea Maritime University. He works out of the Employer's office in Elizabeth, whereas his immediate supervisor Bae is stationed at the Cranford home office. The Elizabeth facility contains three desks with computers in an open area- a desk for Yoon, a desk for Peiris/Patel, and an empty desk that Bae uses when he visits the premises. Yoon is assigned a daily work schedule, 10:00 a.m. to 6:30 p.m., although Yoon testified that his work hours change when vessels are delayed. His detailed job description enumerates responsibilities including coordinating operations with Dubai headquarters, equipment control employees, stevedores in all three ports, other member

alliance shipping lines, and ship masters. Yoon must also prepare reports and invoices and investigate ship structure and container damage. Yoon's job description is silent regarding any supervisory oversight of Vyas.

Yoon attends Coast Guard meetings on behalf of the Employer but has no authority to question Coast Guard orders. It appears that Yoon can request an extension of time to comply with these orders. Furthermore, the record reflects one occasion in late June 2009 in which Yoon attended a meeting of alliance shipping companies regarding consolidation of operations into Maher terminal. Yoon alone represented the Employer at this meeting. The record reflects that prior to this meeting, Vitirana and Bae authorized Yoon to sign a memorandum of understanding on behalf of the Employer only if certain specific conditions were met.

The Employer contends that Vyas "reports" to Yoon. Also, the Employer contends that Yoon grants Vyas' time off requests. The record is replete with e-mails from Vyas on this subject. Yvas testified that Bae authorizes his personal time off and that Bae asked him to inform Yoon and Miller when he wanted to take time off.⁷ The e-mails referenced above appear to be a courtesy inquiry to Yoon to ensure that he is working on the requested days off before Yvas secures actual authority to use accrued leave from Bae.

There is no evidence that Yoon has hired, disciplined, or effectively recommended the discipline of any of the Employer's employees. The Employer does assert that on one occasion in July 2009, Yoon effectively recommended discipline of the

⁷ Given the small size of the operations and logistics department, each employee has a designated "backup" to assume his or her job responsibilities when absent from work. For Vyas, the record indicates that either Yoon or Bae assumes his port captain duties when he is absent from work and that Miller is Vyas' designated backup for HAZMAT-related duties.

chief engineer of one of UASC's ships. Yoon's e-mail to UASC officials summarizes an incident between the ship's master and chief engineer which caused UASC to incur approximately \$25,000 in extra labor costs.

When a UASC ship sails through New York harbor, it must first report to immigration, customs, and the Coast Guard with the necessary documentation to secure entry into the Terminal. The Employer contracts with a husbandry agent to facilitate this paperwork and Yoon interacts with Terminal personnel to ensure that the vessel is berthed as soon as possible. He will determine how many "gangs" of stevedores are required to unload the ship's cargo based on the number of cranes needed for the job and the quantity of containers to be loaded and unloaded. The stowage plan for loading containers (essentially how the containers will be arranged on the vessel) is prepared by UASC's headquarters in Dubai. Yoon has no role in formulating this plan, but if he discovers any operational problems with this stowage plan, he will coordinate with Dubai to resolve these problems. Bae testified that if Yoon cannot reach anybody in Dubai, he may coordinate with the ship's master regarding a change to container positioning.

UASC's Dubai headquarters also establishes a coastal schedule for its vessels, meaning the scheduled arrival and departure times for its vessels at all of its North American ports of call. Based on this information, Yoon then prepares an operations plan, which is essentially a duplicate of the coastal schedule, with updated information based on weather and tidal conditions, and communications with the ship's master regarding operational status.

Cut and Run

A vessel's departure time from port is calculated to maximize cost efficiencies. These calculations are based on the number of containers to be loaded and unloaded, available stevedore "gangs" to perform this work, and the sailing window afforded by tide conditions. If a ship misses its sailing window, it must remain in port until conditions permit travel. As a result, UASC can incur additional labor and fuel costs, along with fees charged by the Terminal. Potentially, the vessel may have to skip ports of call to attempt to get back on schedule.

If the port captain sees that weather or tidal conditions may potentially cause travel disruptions, he can authorize the ship to "cut and run," meaning that the ship will be directed to sail before all containers scheduled to be loaded have been loaded.⁸ The Employer asserts that Yoon is authorized to order a "cut and run" without first seeking permission from Bae or UASC's headquarters in Dubai. The record reflects several e-mail exchanges in which Yoon has cut containers from UASC vessels and ordered that the ship sail on without them. In each of these instances, Yoon has cc'd Bae on these e-mails. Yoon asserts that prior to making these decisions he has consulted with Bae over the telephone⁹ and that he only has the independent authority to cut and run on a small number (10 to 20) of empty containers.

The Employer also asserts that Yoon is responsible for all "cut and run" decisions from the port of Savannah, in addition to authorizing repair orders for all North American ports of call.

⁸ The record reflects that UASC has negotiated agreements with its shipping alliance partners, e.g. Hanjin Shipping Company, governing compensation terms in the event that containers miss their scheduled departure. Yoon did not participate in these negotiations.

⁹ Verbally, Bae and Yoon communicate in Korean. Their e-mail correspondences are in English.

e. **Regional Container Controller**

The Employer employs Goldschmitt in its operations and logistics department as the regional container controller. She reports directly to Bae and works a regular schedule of 7:30 a.m. to 4:00 p.m., Monday through Friday. She is a salaried employee who earns approximately \$59,200 a year. Goldschmitt has worked for the Employer for 16 years. Working out of the Cranford office, Goldschmitt oversees all of UASC's containers in North America. She facilitates the relocation and transportation of \$3-4 million in UASC containers and chassis per year. To accomplish this task, Goldschmitt receives daily reports from the Employer's depots indicating the number of empty containers on hand. She then generates weekly stock reports to UASC and Employer officials apprising them of the current container and equipment inventory at North American terminals and depots. She also prepares and sends a stem report to UASC headquarters. This report projects container needs four weeks into the future and serves as a request that empty containers be transported via UASC vessels to replenish inventory. Goldschmitt estimates that UASC headquarters personnel fulfill her requests about 50% of the time.

Goldschmitt also acts as a liaison between the sales and commercial departments regarding inventory requirements. She monitors damaged inventory but does not authorize repairs to containers or chassis. She has no input as to whether damaged containers will be sold or repaired. As part of her job functions, she regularly communicates with the president or vice-president of UASC's container management division.¹⁰

¹⁰ UASC's container management division controls all containers, makes decisions about whether containers will be sold, leased, or hired, and has "the ultimate say as far as our equipment." (Tr. 179).

While Goldschmitt is responsible for managing all of UASC's North American containers, three equipment coordinators perform this function on a regional basis- Banty Patel monitors New York and Baltimore, Randy Brown works out of Norfolk, Kathy Ellis works out of Savannah, and the Employer utilizes a Cincinnati office to monitor Midwest inventory. If these employees need assistance as to whether or where equipment will be moved, they will call or e-mail Goldschmitt.

When asked during the hearing who reported to her, Goldschmitt testified that "it's kind of a grey area," (Tr. 177) indicating that her longevity with the company and prior work experience for a shipping company brings employees, from both within and outside her department, to seek out her guidance and expertise. Regarding Banty Patel, Goldschmitt spot checks his work a few times a week to make sure he is performing his job properly.¹¹ Goldschmitt has never disciplined or verbally warned Patel. The record does reflect one occasion earlier in 2010 when Goldschmitt told Patel that he needed to be on top of his work regarding cleaning up database entries. It appears that other employees cannot update status codes in the Employer's database program unless Patel's work is performed properly.

Goldschmitt's job description, updated in September 2010, indicates that she assists co-workers in solving day to day equipment/logistics issues, establishes policies related to domestic equipment movements, oversees equipment inventories in North America, oversees and arranges empty container positioning, formulates and distributes

¹¹ Patel says that Goldschmitt was present during a portion of his job interview in 2006. At the time, Patel was told that she was going to train him on the Employer's computer programs. He says that nobody has ever told him that Goldschmitt is his manager or supervisor. She coordinates with him regarding equipment inventory because she serves as a liaison to the commercial department. Patel submits all of his time off requests to Bae and Bae has conducted all of his performance reviews.

the weekly stock and stem reports, and oversees the progress of equipment coordinators in other North American offices.

The record reflects one occasion in early 2010 in which Goldschmitt recommended that Melinda Smith, an equipment coordinator based in Savannah, be terminated. Goldschmitt reported to Bae and Vitarana that Smith was not performing well on the job and the Employer subsequently terminated Smith. The record is silent as to whether the Employer conducted an independent investigation of Smith's performance prior to discharging her.

The record also reflects that when Bae started working for the Employer in about 2004, Goldschmitt prepared evaluations for certain department employees that year because she was more familiar with their work performance.¹² As recently as one to two years ago, Goldschmitt also assisted Bae with evaluations for department employees whose work she was more familiar with. This does not appear to be a regular part of Goldschmitt's job function.¹³

III. LEGAL ANALYSIS

A. Standard for Supervisory Status

Section 2(3) of the Act excludes from the definition of the term "employee" "any individual employed as a supervisor." Section 2(11) of the Act defines a "supervisor" as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

¹² Goldschmitt has worked for the Employer in various capacities for 16 years.

¹³ After the petition was filed in the instant matter, Bae e-mailed Goldschmitt instructing her to issue performance appraisals for Patel, Ellis, and Brown this year. Bae issued Patel's performance appraisal in December 2009.

Individuals are “statutory supervisors if: 1) they hold the authority to engage in any one of the 12 listed supervisory functions, 2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment, and 3) their authority is held in the interest of the employer.” *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001). Supervisory status may be shown if the putative supervisor has the authority either to perform a supervisory function or to effectively recommend the same.

The Board has reaffirmed that the burden to prove supervisory authority is on the party asserting it. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006); *NLRB v. Kentucky River*, supra at 711-712. In addition, the Board’s long recognition that purely conclusionary evidence is not sufficient to establish supervisory status remains viable. The Board requires evidence that the individual actually possesses supervisory authority. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006); *Chevron Shipping Co.*, 317 NLRB 379, 381 fn. 6 (1995) (conclusionary statements without specific explanation are not enough). The Board is mindful not to deprive employees of their rights under Section 7 by interpreting the term supervisor too broadly. *Azusa Ranch Market*, 321 NLRB 811, 812 (1996). To separate straw bosses from true supervisors, the Act prescribes that the exercise of supervisory indicia be in the interest of the employer and requires the use of independent judgment. Thus, “the exercise of some supervisory authority in a merely routine, clerical, perfunctory or sporadic manner does not confer supervisory status on an employee.” *Somerset Welding & Steel, Inc.*, 291 NLRB 913 (1988), quoting *Feralloy West Co.*, 277 NLRB 1083, 1084 (1985).

Although the Act demands only the possession of Section 2(11) authority, not its exercise, the evidence still must be persuasive that such authority exists. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006). Job titles, job descriptions, or similar documents are not given controlling weight and will be rejected as mere paper, absent independent evidence of the possession of the described authority. *Id.*; *Golden Crest*, supra at 731, citing *Training School at Vineland*, 332 NLRB 1412, 1416 (2000).

B. Standard for Managerial Status

Although the Act makes no specific provision for managerial employees, under Board policy, this category of personnel has long been excluded from coverage under the Act. *Ladies Garment Workers v. NLRB*, 339 F.2d 116, 123 (2nd Cir. 1964); *Palace Dry Cleaning Corp.*, 75 NLRB 320 (1947); *Ford Motor Co.*, 66 NLRB 1317 (1946).

In *NLRB v. Yeshiva University*, 444 U.S. 672, 682-683 (1980), the Supreme Court described managerial employees as follows:

Managerial employees are defined as those who “formulate and effectuate management policies by expressing and making operative the decisions of their employer.” These employees are “much higher in the managerial structure” than those explicitly mentioned by Congress which “regarded [them] as so clearly outside the Act that no specific exclusionary provision was found necessary.” Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management. Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy.

The reason managerial employees are exempted from the coverage of the Act is “that employees who exercise discretionary authority on behalf of the employer will not divide their loyalty between employer and union.” *Id.* at 687-688.

While work that is based upon technical and professional competence may necessarily involve the exercise of discretion and judgment, technical and professional employees who exercise such discretion and judgment are not necessarily managerial employees. *General Dynamics Corp.*, 213 NLRB 851, 857-58 (1974). Technical and professional employees are not vested with managerial authority merely by virtue of their status because work performed in that status may have a bearing on the direction of their employer. *Id.* at 858.

The decision as to whether an employee is a manager is made on a case-by-case basis depending upon the degree of discretion and authority exercised by the disputed employee. *Drukker Communications, Inc.*, 258 NLRB 734, 743 (1981). However, employees do not acquire managerial status by making decisions or exercising discretion “within established limits set by higher management.” *Holly Sugar Corp.*, 193 NLRB 1024, 1026 (1971). Even the authority to exercise considerable discretion does not render an employee managerial where his discretion must conform to an employer’s established policy. *Albert Lea Cooperative Creamery Association*, 119 NLRB 817, 822-23 (1957).

C. Regional Container Controller

The Employer contends that the regional container controller is a supervisor and manager and therefore, should be excluded from the petitioned-for bargaining unit. In support of its contention, the Employer argues that Goldschmitt prepares employee evaluations, effectively recommends discipline, reviews resumes and participates in interviews of department job candidates, supervises three employees and addresses errors in their work, regularly attends “management meetings” and receives management e-mail

correspondence, and exercises independent judgment to spend the Employer's money to relocate containers and chassis. Although the Employer asserts that she possesses the aforementioned indicia, the record does not reveal this to be the case. I will address the Employer's arguments in order.

Evaluation of Equipment Coordinators

In 2004, Goldschmitt prepared evaluations for several department employees at Bae's request because Bae had just recently joined the Employer and he was not sufficiently familiar with these employees' performance. Also, about one to two years ago, Goldschmitt assisted Bae with evaluations of several department employees because she was more familiar with their work. None of these evaluations¹⁴ was placed into the record. It appears that in all other years, Bae has prepared and issued performance appraisals for operations and logistics department employees. Although the Employer contends that Goldschmitt is Patel's supervisor, Patel asserts that Bae has issued all of his performance appraisals. The record does contain Patel's 2009 appraisal, which was prepared and authored by Bae.

The Board cautions against finding supervisory authority based only on infrequent instances of its existence. *Family Healthcare, Inc.*, 354 NLRB No. 29 (2009), *Golden Crest Healthcare*, supra at 730, fn. 9. Based on the record evidence, I cannot conclude that Goldschmitt is a statutory supervisor based on the sporadic assistance she offers to Bae in preparing performance evaluations. This does not appear to be one of her regular or enumerated job functions, and her assistance in past evaluations appears to stem more

¹⁴ The Employer makes much of the fact that Goldschmitt and Yoon are evaluated using special appraisal forms exclusively reserved for management. The record reflects that in 2009, Bae used the same appraisal form for Goldschmitt and Yoon that he used for Peiris, an employee stipulated by the Employer to be eligible to vote in the petitioned-for bargaining unit. Therefore, I place no weight on the appraisal forms as being indicative of managerial employee status.

from her long tenure with the Employer than from any supervisory indicia assigned to the regional container controller position.

Effective Recommendation of Discipline

The Employer argues that Goldschmitt has the authority effectively to recommend discipline. To prevail, the Employer must prove that: (i) Goldschmitt submits actual recommendations, and not merely anecdotal reports, (ii) her recommendations are followed on a regular basis, (iii) the triggering disciplinary incidents are not independently investigated by superiors, and (iv) the recommendations result from her own independent judgment. *ITT Lighting Fixtures*, 265 NLRB 1480, 1481 (1982), enf. denied on other grounds 712 F.2d 40 (2nd Cir. 1983), cert. denied 466 U.S. 978 (1984). The record contains one example of Goldschmitt recommending discipline in her approximately six years serving as the regional container controller. In early 2010, Goldschmitt reported to Bae and Vitarana that Melinda Smith, an equipment coordinator based in Savannah was not working out on the job and recommended that she be discharged. The record only reflects that Smith was in fact discharged. The record is silent as to whether Bae, Vitarana, or human resources personnel independently investigated Smith's performance prior to discharging her. Without any documentary evidence in the record reflecting Goldschmitt's recommendation and the subsequent paper trail detailing the Employer's actions, the record simply contains conclusionary statements about one isolated incident in six years in the same job capacity. Therefore, I conclude that the Employer has not carried its burden to prove Goldschmitt effectively recommends discipline. See *American Directional Boring, Inc.*, 353 NLRB 166, 178 (2008); *Children's Farm Home*, 324 NLRB 61 (1997) (the authority to effectively

recommend generally means that the recommended action is taken without independent investigation by superiors, and not simply that the recommendation is ultimately followed).

Reviews Resumes and Participates in Job Interviews

The Employer asserts that by reviewing resumes and participating in job interviews, Goldschmitt effectively makes recommendations regarding the hiring of department employees. The record reflects Goldschmitt's bare assertions that she helps review resumes, has sat in on job interviews, and has made recommendations to unidentified individuals regarding hiring. The record is silent as to whether any Employer official asked her to review resumes, how many resumes she reviewed, for what positions these candidates were applying, or how many job interviews in which she has participated. No specific testimony was adduced on these subjects other than Goldschmitt participated in Patel's job interview for 5-10 minutes. She apparently asked him a few questions and Patel was told that Goldschmitt was going to be training him on the Employer's computer systems. It is unclear the nature of the questions she asked. She was not present at the beginning of the interview nor was she present at the interview's conclusion. It is also unclear as to whether Patel is the employee that Goldschmitt recommended for hire. Based on this sparse record, I reject the Employer's contention that Goldschmitt effectively recommends employees for hire.

Supervises Employees and Addresses Errors in their Work

The Employer next contends that Goldschmitt supervises three employees and addresses errors in their work, asserting that she responsibly directs these employees in the course of their jobs.

For direction to be responsible, the person directing must have oversight of another's work and be accountable for the other's performance. To establish accountability, it must be shown that the putative supervisor is empowered to take corrective action, and is at risk of adverse consequences for others' deficiencies.

Oakwood Healthcare, 348 NLRB at 691-692.

In the instant case, the evidence as to responsible direction is skeletal. Not all *ad hoc* instruction is necessarily supervisory, *Croft Metals*, 348 NLRB at 722, and there is barely any showing here that Goldschmitt provides *ad hoc* instruction to her three alleged subordinates. The record here indicates that Goldschmitt "spot checks" Patel's work a few times a week to see that he is performing his job properly. Early on in Patel's employment (he started working for the Employer in 2006), Goldschmitt told Patel when he was making mistakes inputting information in the Employer's database, but this appears to be more of a mentoring function than a supervisor directing a subordinate's work.

Furthermore, the record is silent regarding any specific interactions between Goldschmitt and the equipment coordinators in Norfolk and Savannah. Goldschmitt, however, acknowledges that employees both inside and outside of the department seek out her guidance due to her longevity with the company and familiarity with the computer systems.

Although her job description, to some extent, lists oversight responsibilities for equipment coordinators, the record does not disclose that the Employer has trained Goldschmitt on the ramifications of her being held responsible for the performance of others. There is insufficient evidence that the Employer imparted clear and formal notice

to Goldschmitt that she will be held accountable for the job performance of equipment coordinators. See *Golden Crest*, supra at 731. Nor is there any record evidence that Goldschmitt has been held accountable. Based on the above, I conclude that the record does not establish that Goldschmitt responsibly directs the work of the operation and logistics department's three equipment coordinators.

Attends Management Meetings and Receives Management E-mails

The record reflects that Goldschmitt attends bi-weekly management meetings run by Vitarana, and in which Bae and other unnamed "managerial ranking" employees also attend. The record testimony regarding the content of these meetings is sparse, conclusionary, and insufficient to prove that the "manager" title is anything more than a label. All that can be adduced about these meetings is that these individuals talk about company developments and issues related to the company. No minutes from these meetings were entered into evidence.

The same analysis and conclusion applies to the management e-mails. Although the Employer cites in its brief Bae's testimony that Goldschmitt receives all confidential correspondence distributed solely to management personnel, not a single e-mail was placed in the record to support this position.¹⁵ Goldschmitt's sole testimony on this subject, in response to a leading question from the Employer's counsel, was that she received "all e-mails that flow from the president of the company as well as from Dubai that are circulated to managers..." She made no reference to receiving confidential

¹⁵ The Employer also argues that Goldschmitt is a managerial employee by virtue of being invited to attend "familiarization" training in Dubai. She has refused these invitations, although Bae and Yoon have attended these trainings. It is unclear from the record what exactly this training consists of as no training manuals, itineraries, or correspondence reflecting the content or purpose of this training was placed in the record. Because it appears that this "familiarization training" is no more than an opportunity to meet other employees based in Dubai, I do not place any significance on the fact that Goldschmitt and Yoon were invited to attend this training.

documents and no documents were placed into the record confirming the content of these e-mails. Without more than bare conclusionary testimony on this subject, I cannot find that these e-mails make Goldschmitt a managerial employee as defined by the Board and the Courts.

Exercises Independent Judgment

In *Oakwood Healthcare*, the Board, consistent with *Kentucky River*, adopted an interpretation of “independent judgment” that applies to any supervisory function at issue “without regard to whether the judgment is exercised using professional or technical expertise.” The Board explained that “professional or technical judgments involving the use of independent judgment are supervisory if they involve one of the 12 supervisory functions of Section 2(11).” *Oakwood Healthcare*, 348 NLRB at 692. The Board then set forth standards governing whether the exercise of the Section 2(11) criteria are carried out with independent judgment: “actions form a spectrum between the extremes of completely free actions and completely controlled ones, and the degree of independence necessary to constitute a judgment as ‘independent’ under the Act lies somewhere in between these extremes.” *Id.* at 693. The Board found that the relevant test for supervisory status utilizing independent judgment is that “an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” *Id.* Further, the judgment must involve a degree or discretion that rises above the “routine or clerical.” *Id.*

Based on the record evidence, I disagree with the Employer’s contention that Goldschmitt exercises independent judgment in her monitoring and ordering of equipment such that it should extinguish her Section 7 rights. Instead, I conclude that

Goldschmitt's judgments in this capacity do not rise above the routine and clerical standard set forth by the Board and her "independent judgment" is not used in the exercise of any of the twelve supervisory indicia or used in such a way to confer on her managerial status. In this regard, Goldschmitt spends money to direct or redirect containers and chassis based on where inventory is needed. Computer programs tell her where her containers are currently located and where they are needed. She then submits stem reports to UASC headquarters requesting redistribution of these containers. I reject the Employer's argument that managerial status is conferred by the mere fact that Goldschmitt prepares reports for review by Dubai which can potentially impact upon the costs of the Employer's or UASC's operation. Such a causal connection does not reveal a role in formulating business policy nor does the impact of this report on the Employer's costs evince managerial authority. See *General Dynamics*, 213 NLRB at 858. Additionally, it does not appear that such functions place Goldschmitt's actions free from the control of others nor does it thrust her into her into 2(11) supervisory status simply by virtue of the volume or expense of the inventory she monitors.

Furthermore, I have already rejected the Employer's contentions that Goldschmitt possesses any of the twelve indicia of supervisory status¹⁶ (to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action). Since the Board in *Oakwood* reiterated that the exercise of independent

¹⁶ The Employer also argues that Goldschmitt possesses supervisory status by authorizing time off for employees. I reject this argument. The record is clear that she has only approved leave requests 1) in Bae's absence; 2) after consulting first with human resources; and 3) after confirming that the employee has accrued the time necessary to cover his or her leave request. This conclusionary testimony about isolated incidents of approving leave requests falls far short of the evidentiary burden required to confer 2(11) status.

judgment must be in conjunction with one of the above twelve factors, I must conclude that any exercise of independent judgment by Goldschmitt during the course of her job is unrelated to supervisory status as defined by the Board and will not obviate her Section 7 rights.

In conclusion, I find that the Employer has failed to carry its burden of proving that Goldschmitt is a supervisor or manager and I order her inclusion in the petitioned-for unit.

D. Port Captain Yoon

The Employer contends that Port Captain Yoon is a supervisor and manager and therefore, should be excluded from the petitioned-for bargaining unit. In support of its contention, the Employer argues that Yoon has recommended disciplinary action for UASC's chief engineer; has the independent authority to have a vessel cut and run or to hold a vessel in port; independently alters stowage plans and coastal schedules; supervises port captain Vyas; determines where repairs are made; exercises independent judgment in ordering gangs at all ports of call; and is regularly invited to management meetings and receives management e-mail correspondence. I will address these arguments in order.

Recommends Discipline

The Employer asserts that Yoon exercised supervisory authority in July 2009 by effectively recommending the discipline of a UASC chief engineer. I reject this assertion. The record makes clear that Yoon witnessed an exchange between the ship's captain and chief engineer and miscommunications between the parties forced UASC to incur approximately \$25,000 in extra stevedore charges. Yoon documented this exchange

not to recommend discipline but to ensure that the Employer, and most likely he, would not be blamed for the penalty incurred. His July 15, 2009 e-mail makes no reference to a recommendation of discipline for either the chief engineer or the ship captain. Based on the record evidence, I cannot conclude that the resulting removal of the chief engineer at the next port is an example of Yoon's effective recommendation of discipline. Since the record is devoid of other examples of disciplines Yoon has either initiated or issued, I conclude that Yoon does not possess the 2(11) indicia of discipline or effectively recommending discipline.

Cut and Run

The Employer asserts that Yoon's independent authority to "cut and run" or to hold a ship in port qualifies him as a managerial employee and/or supervisor. I reject this assertion and find that what discretion Yoon does exercise in this regard is a function of the technical and professional nature of his work. I also find no evidence that Yoon formulates the Employer's business policies. This is significant in the area of the "cut and run" because it appears that the Employer, UASC, and its alliance partners are operating under negotiated guidelines governing the responsibilities and remedies available to each party should an event like a cut and run occur. These guidelines are the foundation for the May 21, 2010 e-mail exchange between Yoon and Hanjin representatives. Although the Employer cites this exhibit as an example of Yoon's independent decision-making, I find that this example exemplifies the blending of Yoon's technical expertise in nautical engineering with established Employer policies. I reach the same conclusion after reviewing the January 11 and 12, 2010 e-mail exchange between Yoon and Bae. It appears that Bae had given Yoon standing orders regarding

the handling of last minute orders in the context of a cut and run. Yoon followed these instructions, much to the dismay of other Employer officials. Employees do not acquire managerial status by making decisions or exercising discretion “within established limits set by higher management.” *Holly Sugar Corp.*, 193 NLRB 1024, 1026 (1971). By recommending that a ship cut and run (or that it be held in port), I find that Yoon is making a recommendation in the obvious interest of thrift rather than acting with a managerial prerogative.

Independently Alters Stowage Plans and Cargo Schedules

The Employer argues that managerial status is conferred on Yoon by possessing the authority to independently alter stowage plans and cargo schedules. I disagree. UASC personnel in Dubai prepare stowage plans and cargo schedules. If adjustments must be made regarding stowage plans, Yoon must first contact Dubai, and if unsuccessful, he may consult with the ship’s master to remedy the situation. Board decisions have found “vessel planners” to be statutory employees, See e.g. *Matson Terminals, Inc.*, 321 NLRB 1447 (1996), but in this instance, Yoon’s stowage plan responsibilities are significantly diminished. He has no hand in formulating the initial plan and must follow a chain of command to effectuate any changes. Whatever discretion he is afforded to alter the plan is limited in scope and reveals that his professional expertise is integral to the Employer’s operation, but does not reveal a role in formulating business policy. See *General Dynamics*, 213 NLRB at 858.

Regarding adjustments to coastal schedules, I find that such discretion and judgment is rooted in the technical and professional nature of Yoon’s work. Yoon possesses a bachelor’s degree in nautical engineering and has spent most of his

professional life in this line of work. Yoon applies his expertise to the incoming weather and tidal conditions, while mindful of labor costs and other economic considerations to determine whether coastal schedules require alteration. This is an example of professional judgment, not managerial or supervisory authority. That Vyas does not enjoy this level of responsibility does not automatically extinguish Yoon's Section 7 rights. The decision as to whether an employee is a manager is made on a case-by-case basis based on the degree of discretion and authority exercised by the disputed employee. *Drukker Communications, Inc.*, 258 NLRB 734, 743 (1981). In this case, I find that Yoon's authority relative to stowage plans and coastal schedules does not make him a managerial employee.

Supervision of Port Captain Vyas

Based on the record evidence, I do not find that Yoon either responsibly directs or assigns work to Vyas. Directing employees means generally overseeing them, deciding what task shall be undertaken next and who shall do the task, including *ad hoc* instructions to perform discrete tasks. *Oakwood Healthcare, Inc.*, 348 NLRB at 692. The Board interpreted the phrase "responsibly to direct" to include an element of accountability. *Id.* The record contains Vyas' testimony that Yoon gives him work instructions along with a number of e-mails that show Yoon communicating instructions to the Savannah port captain. These e-mails relate to ship repairs, maritime laws, and dialogue with ship masters. Some e-mails clearly are rooted in a more senior employee advising a less experienced captain regarding company protocol. Other e-mails contain specific orders for Vyas to carry out. But what is missing from the e-mails and from the record in general is the element of accountability. The record is silent regarding the

prospect of adverse consequences for Yoon if Vyas fails to follow through with his directives. Most notably, Yoon's performance evaluation omits any reference in the narrative to his supposed supervision of Vyas. The narrative focuses only on improving time management skills. Without this element of accountability, I cannot find that the Employer has satisfied its burden of proof in the supervisory indicia of responsible direction.

To "assign" for purposes of Section 2(11) refers to the designation of significant overall duties to an employee, not to the...ad hoc instruction that the employee perform a discrete task."¹⁷ See *Oakwood Healthcare, Inc.*, 348 NLRB at 689. While it is clear from the record that Yoon occasionally asks Vyas to perform a discrete task, I find that Yoon is not responsible for assigning significant tasks or responsibilities to Vyas. Bae defines the scope of Vyas' overall duties (e.g. withholding stevedore oversight responsibilities and setting the communications chain of command), not Yoon. Bae also sets Vyas' hours and approves his vacation requests. Bae's September 25, 2009 e-mail to Yoon is illustrative of this point when he says that "...You are supposed to request before you decide something that is to be performed by others." Therefore, under *Oakwood's* standard, Bae is the one who "assigns" work to Vyas.

Based on all of the evidence under consideration here, I cannot conclude that Yoon is Vyas' supervisor as defined by Section 2(11) of the Act.

¹⁷ The Board explains that if a charge nurse designates an LPN to be the person who will regularly administer medications to a patient or a group of patients, the giving of that overall duty to the LPN is an assignment. On the other hand, the charge nurse's ordering an LPN to immediately give a sedative to a particular patient does not constitute an assignment.

Determining When and Where Repairs are Made

The Employer argues that Yoon's authority to determine when and where ship repairs are made transform him into a managerial employee or a supervisor. I reject this argument. Yoon can decide in which port of call ship repairs should be made. He factors economic and safety considerations into his decisions, along with his technical and professional expertise. The Employer has designated parties that carry out repairs at designated costs. Yoon has no responsibility in formulating these policies. Much like his authority to cut and run, I find that Yoon is making a recommendation in the obvious interest of thrift and safety rather than acting with a managerial prerogative.

Exercises Independent Judgment in Ordering Gangs at all Ports of Call

I reject the Employer's contention that Yoon is a managerial employee and/or a supervisor under the Act by ordering stevedore gangs at all ports of call. I find this responsibility to be routine in nature. Stevedores are employees of the terminals in which they work. Their wages rates and working conditions are set forth in separate collective bargaining agreements. Yoon is simply determining how many gangs are necessary to load and unload cargo based on the same static set of variables: arrival time, number of containers, number of cranes available, tidal conditions, and scheduled departure time. Any independent judgment used by Yoon in securing stevedore services is wholly routine and is not characteristic of a managerial employee and/or statutory supervisor.¹⁸

¹⁸ I also find that Yoon's interactions with the Coast Guard and with customers are not indicative of managerial status. Regarding the Coast Guard, Yoon simply acts as a liaison relaying instructions to the vessel's master. Also, Yoon's authority to entertain customers and visitors at the Terminal has no causal connection to a finding of managerial status.

Attends Management Meetings and Receives Management E-mails

For the reasons discussed above regarding Goldschmitt (see pages 20-21), I also refuse to extinguish Yoon's Section 7 rights based on the conclusionary evidence set forth in the record.

Conclusion

Based on the above and the record as a whole, I find that the port captain and the regional container controller are neither managerial employees nor statutory supervisors. Therefore, I find them to be employees as defined in the Act and order their inclusion in the petitioned-for bargaining unit.

IV. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Employees engaged in an economic strike who have retained their status as strikers and have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike that have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll

period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether or not they desire to be represented for collective bargaining purposes by

International Longshoremen's Association, Local 1964, AFL-CIO.

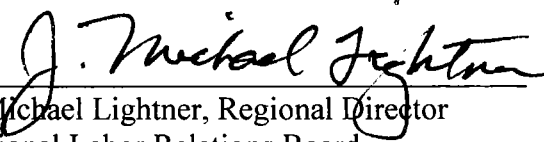
V. LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters in the unit found appropriate above shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in NLRB Region 22, 20 Washington Place, Fifth Floor, Newark, New Jersey 07102, on or before **January 5, 2011**. No extension of time to file this list shall be granted except in extraordinary circumstances nor shall the filing of a request for review operate to stay the requirement here imposed.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. The Board in Washington must receive this request by **January 12, 2011**. The request may be filed electronically through E-Gov on the agency's website, www.nlr.gov, but may not be filed by facsimile¹⁹.

Signed at Newark, New Jersey this 29th day of December, 2010.


J. Michael Lightner, Regional Director
National Labor Relations Board
Region 22
20 Washington Place- 5th Floor
Newark, New Jersey 07102

¹⁹ To file the request for review electronically, go to www.nlr.gov and select the E-Gov tab. Then click on the E-Filing link on the menu and follow the detailed instructions. Guidance for E-Filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Agency's website, www.nlr.gov.